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No. 09-1467

Supreme Court U.S.
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IN THE

Supreme Court of the United States

WORLD TRADE CENTER FAMILIES FOR PROPER BURIAL, INC., KURT HORNING, DIANE HORNING, ANTHONY INGRASSIA, GLORIA INGRASSIA, ARTHUR RUSSO, ARLENE RUSSO, JAGDISH BHUKHAN, INDIRA BHUKHAN, CATHERINE REGENHARD, ALBERT REGENHARD, MONICA GABRIELLE, ROSEMARY CAIN, KRISTEN BREITWIESER, MINDY KLEINBERG, LORIE VAN AUKEN, WILLIAM DOYLE, SR., CAMILLE DOYLE,

Petitioners,

v.

THE CITY OF NEW YORK, MICHAEL R. BLOOMBERG, Mayor of the City of New York, JOHN J. DOHERTY, Commissioner of the New York City Department of Sanitation, AMANDA BURDEN, Chair of the New York City Department of City Planning,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether New York state law, the Due Process Clause, or the Free Exercise Clause provide a right to a small minority of family members of victims of the September 11th attacks on the World Trade Center ("WTC") to compel the City of New York ("City") to excavate and relocate more than one million tons of material examined after the attacks because that minority is dissatisfied both with the manner in which the City previously searched the material for human remains, evidence, and personal effects and the City's decision not to excavate, search again, and relocate the material.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents the City, Michael R. Bloomberg, John J. Doherty, and Amanda M. Burden respectfully submit this brief in opposition to the petition for writ of certiorari filed by Petitioners World Trade Center Families for Proper Burial, Inc., et al.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1-9) is unpublished but electronically reported at 359 Fed. Appx. 177, 2009 WL 4981779. The opinion of the United States District Court for the Southern District of New York (Pet. App. 10-38) is published at 567 F. Supp. 2d 529.

JURISDICTION

The Second Circuit filed its opinion on December 23, 2009. The Second Circuit denied Petitioners' petition for rehearing *en banc* on March 5, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The collapse of the WTC Twin Towers resulted in a scene of devastation unlike anything this country has ever witnessed. The City and other entities immediately engaged in an unprecedented and multi-faceted response effort: locating and aiding survivors, extinguishing fires, protecting the public and restoring order, as well as more long-term recovery efforts such as restoring essential services to the community and repairing the infrastructure of lower Manhattan. Among these numerous and sometimes competing responsibilities, City, state, and federal officials also worked tirelessly to develop and implement a thorough and dignified process to search the approximately 1.6 million tons of material that was the remnants of the World Trade Center ("WTC material") for human remains, evidence, and personal effects. This material was initially examined at the World Trade Center site (the "WTC Site" or "Ground

Zero") and then removed to the Fresh Kills Landfill ("Fresh Kills") to be further searched and to permit other critical Ground Zero recovery efforts to continue.

Petitioners—eleven families of victims of the attacks (and their association)—brought suit second-guessing the manner in which the City performed the massive search and recovery effort and claiming a constitutional right to all WTC material at Fresh Kills. The Second Circuit and the District Court concluded that neither the Constitution nor New York law provide Petitioners with a right to compel the City—at taxpayer expense—to excavate, reexamine, and relocate more than one million tons of WTC material because they are dissatisfied with the manner in which the City conducted the prior search.

The Second Circuit and the District Court held, *inter alia*, that: (1) New York law does not provide Petitioners with an enforceable interest in the undifferentiated mass of WTC material that may or may not contain the unidentifiable remains of their loved ones (Pet. App. 5-7, 34-35); (2) the City's alleged conduct in responding to the WTC collapse and searching the WTC material, as well as the City's subsequent refusal to excavate, search again, and relocate more than a million tons of WTC material, neither shocked the conscience nor amounted to deliberate indifference (Pet. App. 7, 27-28); and (3) any purported interference with Petitioners' religious rights was not sufficient to state a constitutional claim because the City's actions did not target religious beliefs and, in any event, were justified by the City's compelling governmental interest in economically and efficiently searching and clearing the WTC material (Pet. App. 8, 28-33).

The Court should deny review because the central question—whether Petitioners have an enforceable property interest in the undifferentiated mass of WTC material—is a question of New York state law. Petitioners also request review of alternative issues that neither the Second Circuit nor the District Court addressed below. Moreover, the questions presented by Petitioners do not conflict with the precedent of this Court or other courts, and will likely have limited significance beyond the unique facts of this case.

The City re-opened Fresh Kills in the immediate aftermath of the September 11th terrorist attacks to receive WTC material and to allow law enforcement officials to inspect and search the material for human remains, personal effects, and evidence. Fresh Kills was designated as a crime scene and the New York City Police Department ("NYPD"), with the assistance of the Federal Bureau of Investigation ("FBI"), New York City Department of Sanitation ("DSNY"), and other government agencies, embarked on a complex evidence-collection effort and detailed forensic investigation of unprecedented scale. Beginning in the early morning hours of September 12, 2001, material from the WTC Site began arriving at Fresh Kills by truck and, thereafter, by barge. It was taken to a hill in Fresh Kills for examination by law enforcement. At the height of the operation, approximately 1,500 people assisted in the search and recovery effort each day. Among them were forensic experts and members of FBI evidence recovery teams that worked on previous disasters and bombings such as the destruction of TWA Flight 800, the bombing of the U.S. Embassy in Nairobi, the 1993 WTC bombing, and the bombing of the Murrah Federal Building in Oklahoma City.

Because of the unprecedented magnitude of the events of September 11th, the recovery effort at Fresh Kills was an evolving process. In the first few weeks, NYPD, FBI, and other law enforcement officers would meticulously and systematically search the material by hand for human remains, personal effects, and evidence. After each search was completed, NYPD would authorize DSNY to take possession of the remaining material for placement in Fresh Kills to make room for additional material from the WTC Site.

The initial search process was modified with the introduction of different techniques and machinery. Within ten days of receiving the first load of WTC material, industrial shaker screening machines ("shakers") were incorporated into the search process to screen and sort the material. The search process was further modified within approximately the first month of the operation to introduce machines provided by Taylor Recycling LLC ("Taylor") and Yannuzzi Disposal Services, Inc. ("Yannuzzi"). Using manual searching, shakers, and the Taylor and Yannuzzi screening machines, the NYPD, FBI, United States Army Corps of Engineers, and Phillips & Jordan, Inc. (an Army Corps contractor) established a multi-faceted procedure to search the WTC material. The Taylor and Yannuzzi machines further screened and sifted material that passed through progressively smaller screens and sorted it into discrete streams of material based on size. The machines sent each of the streams onto separate conveyor belts. Any material a 1/4 inch or larger was manually examined for human remains, personal effects, and evidence by law enforcement personnel stationed alongside the conveyor belts. The finest particles (the "fines")—the materials measuring less

than a 1/4 of an inch—passed through the smallest screen on the machines and were separated by the machines to be deposited in Fresh Kills.[1]

The City took steps to ensure that all of the WTC material that arrived at Fresh Kills was thoroughly sorted, sifted, and screened. Near the conclusion of the operation, the City used previously recorded GPS coordinates to locate and excavate WTC material that was only manually searched during the first few weeks of the operation in September 2001. This material was then searched a second time by NYPD personnel using the established search processes and protocols, and where appropriate (based on the size of the materials), screened and sifted with the shakers and Taylor and Yannuzzi screening machines.[2]

By the conclusion of the recovery operation in August 2002, the City had searched more than 1.6 million tons and deposited more than 1.2 million tons of WTC material in a 48-acre portion of Fresh Kills.[3] This monumental and unprecedented effort suc-

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[1] Petitioners claim that an FBI official, as well as certain City officials, promised them that the fines would not be commingled with other searched WTC material and deposited in Fresh Kills. Pet. 2, 7-8, 29. Petitioners also assert a variety of baseless claims intended to call into question the efficacy of the effort. Pet. 6-7, 27-28. Respondents dispute these claims. But, as noted by the Second Circuit and the District Court, these disputes were not material to the lower courts' decisions. Pet. App. 5, 27. Respondents also dispute the various assertions made by Petitioners for the first time in the instant petition. Similarly, however, these disputes are irrelevant to the disposition of the petition.

[2] Petitioners do not acknowledge that the City excavated this material and searched it a second time.

[3] Certain material such as large structural steel was shipped to recyclers and not deposited at Fresh Kills.

ceeded in recovering thousands of human remains and personal effects despite the massive destruction at the WTC Site. Those remains and personal effects that could be genetically identified were returned to victims' families. Remains that could not be identified through DNA testing or other analyses are currently being preserved by the New York City Office of Chief Medical Examiner for further analysis as advanced scientific methods of testing are developed. Notwithstanding all of these efforts, the unfortunate reality is that many victims' remains simply could not be recovered or identified.

Following the WTC recovery operation, the City began moving forward with its pre-September 11th plans for the closure and redevelopment of Fresh Kills. Petitioners objected and demanded that the City excavate and relocate all of the WTC material from Fresh Kills to another location. After due consideration, the City determined that it would not excavate and relocate the more than 1.2 million tons of WTC material at Fresh Kills. In 2004, the City announced plans to develop Fresh Kills as a City park with a monument honoring the victims of the WTC attacks and the City invited the Petitioners to participate in the design of the monument. Petitioners again objected and demanded that the City remove all WTC material prior to any development of Fresh Kills.

Petitioners ultimately brought suit asserting violations of the Due Process Clause and the Free Exercise Clause, as well as New York law, arising from the City's purported improper search of the WTC material at Fresh Kills (particularly during the initial stages of the search and recovery operations), the alleged commingling and depositing of the less-

than-1/4-inch fine material with the other searched WTC material, and the City's denial of their request to excavate, resift, and relocate all of the material. Petitioners claim that the City's alleged conduct interfered with their ability to possess and bury their loved ones' remains. Petitioners sought to enjoin Respondents from proceeding further with the closure and redevelopment plans for Fresh Kills and to compel Respondents to excavate, resift,[4] and relocate the WTC material at the City's expense.

The parties met many times in an effort to bring about an amicable resolution. The City offered repeatedly to construct a memorial and to work with the victims' families on the design of the memorial. But Petitioners insisted that any settlement require that the City excavate and relocate all 1.2 million tons of WTC material at Fresh Kills to another location. As a result, the District Court's and the City's efforts to resolve the litigation proved unsuccessful. The District Court granted Respondents' motion and dismissed Petitioners' action pursuant to Fed. R. Civ. P. 12(b)(6). Pet. App. 10. The Second Circuit unanimously affirmed. Pet. App. 1.

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[4] Petitioners now maintain that they are no longer seeking to have all of the WTC material resifted. Pet. 10 n.2. Whether Petitioners seek re-sifting or not is irrelevant to the issues presented in the petition and to the disposition of the petition.

REASONS FOR DENYING THE PETITION

I. FURTHER REVIEW OF THE SECOND CIRCUIT'S HOLDING THAT NEW YORK LAW DOES NOT PROVIDE PETITIONERS WITH AN ENFORCEABLE CONSTITUTIONAL INTEREST IS NOT WARRANTED

The Court should not grant review of the Second Circuit's holding that Petitioners do not have a cognizable property interest in the undifferentiated mass of WTC material at Fresh Kills. First, the Second Circuit's decision is consistent with the precedent of both this Court and other Courts of Appeals in looking to *state law* to determine whether Petitioners have an enforceable property interest in the WTC material. *See* Sup. Ct. R. 10; *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Brotherton v. Cleveland*, 923 F.2d 477, 479 (6th Cir. 1991); *Whaley v. County of Tuscola*, 58 F. 3d 1111, 1113-14 (6th Cir. 1995). And, second, interpretations of state law are typically left to the judgment of the Court of Appeals and the District Court. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("[S]tanding alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review."); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986) ("We generally accord great deference to the interpretation and application of state law by the courts of appeals."); *Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 462 (1967) (quoting *Ragan v. Merchants Transfer Co.*, 337 U.S. 530, 534 (1949)) ("'[W]e ordinarily accept the determination of local law by the Court of Appeals . . . and we will not disturb it here.'"); 22 James Wm. Moore et al.,

Moore's Federal Practice, § 405.03[2][a][iv] (3d ed. 2010) ("[T]he Court will not ordinarily grant certiorari . . . to consider questions of state law decided by federal courts of appeals.").

Third, the lower courts' rulings on this question of New York law are unlikely to have any significant impact beyond the unusual facts of this case. *See Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (stating that the Supreme Court does not "sit for the benefit of the particular litigants" but that "'[s]pecial and important reasons' imply a reach to a problem beyond the academic or the episodic"); *see also* 23 Moore's Federal Practice § 510.41[3][a] (quoting Harlan, *Manning the Dikes*, 13 Record N.Y.C. Bar Ass'n 541, 551 (1958) ("The fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari.")). Petitioners' claim that "there is a need for clarity with respect to the due process interest in unidentifiable remains" because our country inevitably will continue to be beset by terrorist attacks and natural and man-made disasters misses the point. Pet. 26. Petitioners cite Hurricane Katrina, California wildfires, and the Deepwater Horizon oil spill as evidence of these continuing threats, but there is no indication that local or national recoveries from any of these disasters would benefit from the resolution of this issue. Even if these disasters presented a similar issue—and they do not—a ruling from this Court as to property interests under New York law would hardly be relevant as to claimed property interests in Louisiana, California, or any other state.

Fourth, the lower courts' interpretation of New York state law on this issue was entirely correct.

New York law recognizes that next of kin have a quasi-property right in the remains of the deceased. *See, e.g.*, *Colavito v. N.Y. Organ Donor Network, Inc.*, 356 F. Supp. 2d 237, 244 (E.D.N.Y. 2005). But this right is limited to possession of *identified* remains of one's next of kin for the sole purpose of ensuring a proper burial. Indeed, every case cited by Petitioners involves the possession of *identified* human remains of a particular plaintiff's next of kin. For example, in the cases cited by Petitioner involving cremated remains, there was no dispute that the remains were the next of kin of a particular family member, and thus no need for them to be identified scientifically. *See Schmidt v. Schmidt*, 267 N.Y.S.2d 645 (N.Y. Sup. Ct. 1966); *see also Roach v. Stern*, 675 N.Y.S.2d 133, 134 (2d Dep't 1998). "Without something tangible or identifiable, there is no property right." Pet. App. 25 (citing *Comite En Memoria Del Vuelo 587 Inc. v. Hirsch*, No. 100382/2005 (N.Y. Sup. Ct. April 26, 2005)).

In contrast, Petitioners claim a collective interest in, and seek the excavation and relocation of, *all* of the WTC material in Fresh Kills because the ashen remains of *some* unspecified victims of the WTC attacks *may* be intermingled with the undifferentiated WTC material. As both the Second Circuit and District Court correctly concluded, "[n]o case has extended such a right" to an undifferentiated mass "that may or may not contain undetectable traces of human remains not identifiable to any particular human being." Pet. App. 25 (Southern District of New York); *see also* Pet. App. 5 (Second Circuit). Neither New York law nor the Due Process Clause require the City to excavate more than one million tons of WTC material from Fresh Kills at a tremendous cost to the citizens of New York because there is

a chance that some remains of some unidentified victims may be located there.[5]

Finally, the Court should not review this issue because in the unlikely event that the Court was to conclude that the lower courts erred in their interpretation of New York law, even that conclusion would not alter the outcome. The Second Circuit determined that Petitioners' due process claim also fails on alternative grounds (Pet. App. 5) and Petitioners have not sought review of that ruling. *See* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *see also Glover v. United States*, 531 U.S. 198, 205 (2001). Even if Petitioners had sought review, certiorari would not be appropriate because the Second Circuit correctly applied the Court's well-established precedent. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). Only arbitrary and egregious action that shocks the conscience will give rise to a substantive due process claim. *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998). The Second Circuit properly concluded that Petitioners' claims regarding the City's alleged conduct do not satisfy the standard, holding that "[c]learly, the City acted responsibly, without 'reckless or deliberate

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[5] Petitioners make the conclusory assertion, as they did before the lower courts, that they should have been permitted to conduct discovery to prove their interest in the WTC material. Pet. 24. But no amount of discovery would establish that Petitioners' have an enforceable interest in the WTC material at Fresh Kills. Pet. App. 5 (concluding that Petitioners failed to show "how further discovery would render their claims viable").

indifference that would shock the conscience.'" Pet. App. 6.

Petitioners' allegations evince nothing more than disagreement with the manner in which the City conducted the massive recovery effort and dissatisfaction with the City's subsequent refusal to excavate and relocate the WTC material. However, "[t]here was no protocol on how to respond to the catastrophe suffered by the City." Pet. App. 6, 27. City officials were faced with unprecedented challenges and multiple competing public interests. Amid these responsibilities, "the City acted responsibly" and "sought through all its actions to bring about a swift and efficient recovery from the terrorist attack." Pet. App. 6-7, 27-28. As stated by the Second Circuit,

> To the extent the scene depicted in plaintiffs' complaint "shocks the conscience," it does so because of the magnitude of the events that occurred on September 11, not because of the City's response. As the District Court found, these municipal actions and decisions represent, at most, a lack of due care. Even after the atmosphere of emergency had dissipated, affording a greater opportunity for "actual deliberation," the City's conduct does not amount to "deliberate indifference" to plaintiffs' rights.

Pet. App. 7.

Accordingly, for all of the reasons stated, further review of Petitioners' due process claim is not warranted.

II. THE COURT SHOULD DENY REVIEW OF PETITIONERS' CONTENTION THAT THE DUE PROCESS CLAUSE REQUIRED CITY OFFICIALS TO PROVIDE VICTIMS' FAMILY MEMBERS WITH A HEARING PRIOR TO MAKING DECISIONS REGARDING THE SEARCH AND RECOVERY EFFORT

Petitioners contend that the Court should grant review to consider whether the Due Process Clause obligated the City to provide victims' family members with some type of notice and some form of a hearing before making decisions regarding the manner in which the City conducted the search and recovery effort at Fresh Kills. This issue is not appropriate for review because neither the Second Circuit nor the District Court resolved the issue. *See Pierce Cty. v. Guillen*, 537 U.S. 129, 148 n.10 (2003) ("We ordinarily do not decide in the first instance issues not resolved below and decline to do so here."); *Glover*, 531 U.S. at 205 ("[W]e do not decide questions neither raised nor resolved below."). There was no need to consider this issue once the lower courts concluded that Petitioners do not have an enforceable interest in the WTC material at Fresh Kills. Pet. App. 5, 25.

Even if Petitioners do have an enforceable interest in the WTC material—and they do not (*see supra*)—the City was not required to provide Petitioners with notice or an opportunity to be heard because its actions were "legislative," not "adjudicative." *See, e.g., Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 284 (1984) (policy decision by executive agency would be legislative action); *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224,

245 (1973) (proceedings that "adjudicate disputed facts in particular cases" are subject to the requirements of procedural due process); *R.R. Vill. Ass'n v. Denver Sewer Corp.*, 826 F.2d 1197, 1204-05 (2d Cir. 1987). Legislative decisions are government actions of general application that do not rest upon a determination of disputed facts. *See, e.g., United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Bowles v. Willingham*, 321 U.S. 503, 519-520 (1944); *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 143 (2d Cir. 1994) (citing *Air Line Pilots Ass'n v. Quesada*, 276 F.2d 892, 896 (2d Cir. 1960)). The Due Process Clause only requires an opportunity to be heard when the government action is adjudicative, *i.e.*, the decision is based on a determination of facts. *See Codd v. Velger*, 429 U.S. 624, 627-628 (1977); *Interport Pilots Agency*, 14 F.3d at 142 (citing *Fla. East Coast Ry. Co.*, 410 U.S. at 245).

The City's actions indisputably were generally applicable in that they were not directed at Petitioners. And there were no facts for Petitioners to contest or for an adjudicative process to decide. *See Codd*, 429 U.S. at 627-628. The fact that Petitioners now contend they have been harmed by these decisions does not change the City's "legislative" actions into "adjudicative" ones. *See Interport Pilots*, 14 F.3d at 143-144.

Moreover, in these circumstances, it was simply not practicable to provide any pre-deprivation process. *See FDIC v. Mallen*, 486 U.S. 230, 240 (1988) (where an important government interest is coupled with a need for "prompt action[,] . . . postponing the opportunity to be heard until after the initial deprivation" is constitutionally permissible); *see also Hodel v. Va. Surface Mining & Reclamation*

Ass'n, 452 U.S. 264, 299-300 (1981). The City had to search the massive amount of WTC material for evidence and human remains and then quickly place it in designated sections of Fresh Kills to accommodate the search of additional incoming material from the WTC Site. The success of the monumental response and recovery effort at the WTC Site depended upon the efficiency of the effort at Fresh Kills. Halting or delaying recovery operations to provide some unspecified opportunity to be heard to all victims' families would have crippled the entire recovery effort at the expense of the numerous other public interests served by the City's effort. The law does not require such a process. *See FDIC*, 486 U.S. at 240.

III. THE COURT SHOULD DECLINE TO REVIEW WHETHER THE CITY'S RESPONSE TO THE SEPTEMBER 11TH ATTACKS IMPOSED UPON IT A CONSTITUTIONAL DUTY TO TAKE THE ADDITIONAL ACTIONS PETITIONERS DEMAND

Petitioners also contend that the Court should grant review to consider whether the voluntary undertaking of a massive evidence recovery effort, coupled with promises purportedly made by City officials, gave rise to a constitutional duty for the City to perform additional actions demanded by the Petitioners. Pet. 28-30. The Court should decline to review this issue as well because it also was not resolved by the lower courts. *See Pierce Cty.*, 537 U.S. at 148 n.10; *Glover*, 531 U.S. at 205. Again, the lower courts did not need to reach this issue because of their conclusion that Petitioners do not have an enforceable interest in the WTC material. Pet. App. 5, 25.

But even if Petitioners' contentions were properly before the Court, well-settled precedent makes clear that there is no compelling reason for the Court to review this issue. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons.").

Petitioners' claims stem primarily from the City's discretionary decision not to take additional actions such as segregating the fines and maintaining them separately after they were sifted in the process previously described, as well as the City's decision not to excavate the WTC material prior to closure of Fresh Kills. Notwithstanding the discretionary nature of these decisions, Petitioners claim that once the City chose to undertake the recovery effort and made certain alleged promises it was bound by the Due Process Clause to take these additional actions.[6] Petitioners are wrong.

It is well-settled that the Due Process Clause does not confer an affirmative right to governmental aid or assistance. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756-757 (2005). Moreover, a government entity's voluntary action in the public interest does not impose upon it a requirement to perform additional actions. *See DeShaney*, 489 U.S. at 197-198; *Brooks v. Giuliani*, 84 F.3d 1454, 1466-67 (2d Cir. 1996); *Suffolk Parents of Handicapped Adults v. Wingate*, 101 F.3d 818, 824 (2d Cir. 1996). Courts also have consistently rejected

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[6] As noted, Petitioners claim that an FBI official, as well as certain City officials, promised them that the fines would not be commingled with other searched WTC material and deposited in Fresh Kills, and Respondents dispute this claim. Pet. 2, 7-8, 29.

the argument that a citizen's reliance on a government official's promises gives rise to a duty under the Due Process Clause. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Keselman v. City of New York*, 179 Fed. Appx. 774, 775 (2d Cir. 2006); *Bright v. Westmoreland County*, 443 F.3d 276, 283-284 (3d Cir. 2006); *Pinder v. Johnson*, 54 F.3d 1169, 1175 (4th Cir. 1995).

Petitioners' contentions amount to no more than second guessing how the City managed the search and recovery operations after the September 11th terrorist attacks. *See, e.g.*, Pet. 29 ("the City . . . designed, implemented, operated, and managed the recovery effort . . . an effort Petitioners contend was inadequate."). Petitioners' dissatisfaction does not create a constitutional duty requiring the City to undertake the additional efforts that Petitioners demand. Thus, the City's alleged failure to accept Petitioners' advice and take these particular actions does not run afoul of the Due Process Clause. Petitioners have failed to provide a single citation to the contrary. Accordingly, this question does not present a conflict among federal courts or an issue of unsettled law worthy of the Court's review. *See* Sup. Ct. R. 10.

IV. THE COURT SHOULD DENY REVIEW BECAUSE THE SECOND CIRCUIT CORRECTLY AFFIRMED THE DISMISSAL OF PETITIONERS' FREE EXERCISE CLAIM BASED UPON THIS COURT'S SETTLED JURISPRUDENCE

The Court has long held that laws and executive actions that are "neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990)). Thus, the Second Circuit correctly affirmed the dismissal of Petitioners' free exercise claim because Petitioners concede that the City's purpose in implementing the various search processes at Fresh Kills was to recover human remains, personal effects, and evidence—not to infringe on Petitioners' religious rights. Pet. App. 8. The Second Circuit further concluded that it "need not dwell on the level of scrutiny applicable to the City's actions" because the City's interest in efficiently clearing and searching the WTC material was compelling and, thus, "plaintiffs' free exercise claims fail under any standard." Pet. App. 8, 33 ("The City's actions satisfy both a 'rational basis' and a 'compelling interest' test.").

The Second Circuit's straight-forward application of this Court's well-settled free exercise jurisprudence does not warrant further review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). Petitioners do not suggest that the Second Circuit's decision

conflicts with the precedent of this Court or any other court. Instead, Petitioners only suggest that this Court should grant review to opine as to "how central" burial rights are to one's religious tenets. The importance of burial rights to religion is not in dispute. Pet. 34. Nor does it compel a different conclusion than that reached by the lower courts. Indeed, the issue is ultimately irrelevant given the Second Circuit's determination that Petitioners' free exercise claim fails *under any standard* due to the City's compelling interest justifying its actions—a conclusion which Petitioners do not challenge. *See* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). The Court should also deny review because the Second Circuit's ruling on this issue will have limited significance outside of the unique context of this case. *See Rice*, 349 U.S. at 74; *see also* 23 Moore's Federal Practice § 510.41[3][a].

CONCLUSION

The tragic events of September 11, 2001, left an indelible mark on the world, our country, and New York City. None have suffered more than the family members who lost loved ones in the horrific attacks. The sorrow and anguish of family members who lost loved ones is both undeniable and unimaginable. That they do not have a body to lay to rest can only magnify their grief. But the inability to recover the remains of some victims does not provide the Petitioners with a constitutional claim requiring the City, at a tremendous cost, to excavate and relocate more than a million tons of WTC material located across 48 acres. Permitting such suits to go forward would cripple the Executive's ability to effectively

respond to a disaster by inviting any individual or group disagreeing with the government's decisions to sue to enjoin the recovery efforts or to seek redress after the fact through litigation. The lower courts correctly held that, in these dire and thankfully rare circumstances, it is not the province of the judiciary to second-guess the efforts of the Executive. For all of the foregoing reasons, Respondents respectfully request that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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